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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Appellee,

v.

LLOYD CHRIS WALKER,
Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TESTIMONY BY CO-DEFENDANT RUMMELL REGARDING ALLEGED CONVERSATIONS WITH THE APPELLANT ABOUT PREVIOUS ALLEGED INSTANCES OF APPELLANT'S VIOLENT CONDUCT SHOULD HAVE BEEN EXCLUDED WHERE THE PROSECUTION FAILED TO LAY A PREDICATE TO SHOW RELEVANCY UNDER FEDERAL RULES OF EVIDENCE 404(b) AND FAILED TO SHOW THAT THE SUBSTANTIAL PREJUDICE OF SUCH "HIT MAN" EVIDENCE WAS OUTWEIGHED BY SUFFICIENT PROBATIVE VALUE UNDER RULE 403.

II. WHETHER FEDERAL PROSECUTORS VIOLATED APPELLANT'S SPEEDY TRIAL RIGHTS WHEN THEY PURPOSEFULLY DELAYED FEDERAL PROSECUTION WHILE MANUEVERING TO HAVE APPELLANT PROSECUTED IN TWO STATE COUNTIES SUCCESSIVELY, THEN IN AN EFFORT TO DEFEAT THE ACTIONS OF A STATE COURT TO APPLY ITS BOND PROVISIONS AND SPEEDY TRIAL STATUTE TO HIS CASE, THEY RESUMED PROSECUTION OF THE APPELLANT, DENYING HIM HIS RIGHT TO BOND, STATE AND FEDERAL SPEEDY TRIAL RIGHTS, AND CREDIT FOR TIME SERVED.

III. WHETHER WALKER'S POST-ARREST STATEMENTS THAT HE DID NOT KNOW BOYCE RUMMELL WERE PROPERLY ADMITTED AGAINST HIM WHEN THEY WERE OBTAIN-

ED AFTER HE HAD RECEIVED HIS MIRANDA WARNINGS AND REQUESTED AN ATTORNEY AND WHEN HE WAS MISLED INTO BELIEVING THAT IT WAS MANDATORY THAT HE ANSWER SUCH "BACKGROUND INFORMATION."

IV. WHETHER THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY OVER APPELLANT'S OBJECTIONS THAT THEY SHOULD REMEMBER IN EVALUATING THE APPELLANT'S TESTIMONY THAT HE HAD A KEEN PERSONAL INTEREST IN THE OUTCOME OF THE TRIAL.

V. WHETHER THE APPELLANT'S EIGHT MONTH PRE-TRIAL STATE INCARCERATION WAS THE PRODUCT OF SUFFICIENT ACTION BY FEDERAL LAW ENFORCEMENT OFFICIALS AS TO JUSTIFY GIVING APPELLANT CREDIT ON HIS FEDERAL SENTENCE FOR THE TIME HE SPENT IN STATE CUSTODY PURSUANT TO 18 U.S.C.A. § 3568.

VI. WHETHER THE APPELLANT'S MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THE ALLEGED OBJECT OF THE CONSPIRACY, MICHAEL OVERSTREET, WAS BEING COMPELLED TO TESTIFY UNDER THREAT OF CONTEMPT AND WAS NOT IN "FREE EXERCISE OR ENJOYMENT OF ANY RIGHT SECURED TO HIM BY THE CONSTITUTION" AS IS JURISDICTIONALLY REQUIRED BY 18 U.S.C.A. § 241.

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LLOYD CHRIS WALKER,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Appellant, LLOYD CHRIS WALKER, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued July 15, 1983.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 82-1430, *United States v. Walker,* ____F.2d____ (5th Cir. 7/15/83) affirming the judgment of conviction is attached as Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on July 15, 1983, entered its opinion affirming the judgment of conviction in this case. No petition for rehearing or suggestion for rehearing en banc was sought. Instead, jurisdiction of this Court is invoked under Title 28, United States Code, Section 1251.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.

Title 18, United States Code, § 241 states in part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . and if death results, they shall be subject to imprisonment for any term of years or for life.

Rule 404(b) of the Federal Rules of Evidence states:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Course of Proceedings

LLOYD CHRIS WALKER, a person who had never previously had a felony conviction, was arrested on a State warrant which arose as a result of a joint federal and state investigation and prosecution effort and charged with capital murder. Almost one year later he was convicted in Federal court of conspiracy to injure and intimidate one Michael Lee Overstreet, a citizen of the United States, in the free exrecise of his right to give testimony before a federal grand jury and with death having resulted as a consequence of this conspiracy in violation of 18 U.S.C.A. § 241, based on the same facts as his State case.

Prior to the date of Walker's arrest, federal and state prosecutors had reached a plea bargain agreement with his Co-Defendant, Boyce Rummell, in which they agreed that Rummell's State capital murder charges would be dismissed, he would serve his jail sentence in federal custody and testify against Walker in future prosecutions. They agreed, as well, to prosecute Walker in State court because he could be—in theory—eligible for the death penalty there and because he could be denied bond as a defendant in a capital murder case under Texas law. Tex. Pen. C. Ann. Sec. 19.03(a)(3).

However, the State prosecutors were dilatory and sought two continuances in Walker's Travis County case, delaying his prosecution for over four months. Then, as a tactical maneuver and with the "okay" of the federal prosecutors, Travis County prosecutors dismissed their case in order that Appellant might be re-indicted on the

identical charges in Hidalgo County. Appellant was denied bond on his application for a Writ of Habeas Corpus from the Hidalgo County district court and he appealed to the State appellate court. The appellate court ruled that he was eligible for bond and that the two prior continuances were chareable to the State prosecutors in Hidalgo County as well. Appellant was then misled by the State prosecutors into believing that they were appealing this ruling in good faith to the Texas Court of Criminal Appeals when, in fact, they were really arranging to dismiss their indictments and have Appellant charged by the federal prosecutors in the Wetsern District of Texas before the State bail or State speedy trial laws could be applied to Appellant's case by the State courts.

Walker was then tried and convicted in federal court for conspiracy to violate the civil rights of a citizen by threats and intimidation in the free exercise or enjoyment of his right to appear as a grand jury witness, and death having been the result of the conspiracy. He was sentenced to life imprisonment.

This conviction and sentence was affirmed by the Fifth Circuit Court of Appeals on July 15, 1983, by published opinion.

Statement of Facts

On July 13, 1980, two people were killed by a shot fired into a crowded south Texas bar that (according to Co-Defendant Rummell, the government's primary witness) was intended to kill one Michael Overstreet, the potential grand jury witness testifying against Rummell. Walker contended that he was never hired as a "hit man" to kill Overstreet and had never participated in Rummell's

plan to prevent Overstreet's appearance before the Grand Jury to testify as to Rummell's drug conspiracy. Walker was not involved in the drug conspiracy at issue.

Boyce Rummell's testimony was the only evidence offered by the prosecution as to the actions of Walker and Rummell on the night of July 13, 1980, the night of the shooting. Rummell, who was well known as a "big drug dealer" and who had previously been convicted of a drug-related felony, first implicated Walker in the shooting after concluding a plea bargain with the state and federal prosecutors to the effect that any capital murder charges against him would be dismissed and he would serve a plea bargained sentence for a civil rights violation in federal custody.

Once Rummell gave the investigators Walker's name, the prosecuting attorneys from the three forums involved chose Travis County, Texas, as the site for Walker's prosecution because they could obtain a possible capital punishment in the state forum and because a person accused of capital murder may be denied bail under Texas law. (R. 244; T. 16-18; Tex. C. Crim. P. ann., art 29.12)[1]

When Walker was finally tried in federal court, the prosecution resorted to testimony by Rummell which emphasized alleged extraneous offenses supposedly committed by Walker to Rummell. Specifically, the prosecutor had Rummel testify, over the objections of defense counsel, that in conversations with Walker, Walker supposedly told

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1. For clarity of citation to the transcript and the record, counsel has designated citations to the original record as "R." plus the page number which was imprinted on the lower right hand corner by the District Clerk's Office. Citations to the trial transcript are cited as "T." plus the page number as designated by the court reporter.

him that he had killed quite a few people when he was in the military in Viet Nam. Walker supposedly told Rummell that he had previously shot someone in both knees. In addition, according to Rummell, Walker had previously accompanied him to retrieve a "borrowed" pickup truck from someone who had wrongfully taken it and who Rummell thought to be dangerous. The Court admitted virtually all such references to extrinsic offenses even though they were supported only by Rummell's testimony. Only the alleged incident with the pickup truck had any other corrobative testimony. (T. 73)

The prosecution also relied heavily on so-called false exculpatory statements allegedly given by the Appellant at the time of his arrest in which he denied knowing Boyce Rummell. Walker explained that such statements were taken from him while being questioned regarding a police information sheet that the officers had told him was mandatory information that had to be given. Moreover, such statements were elicited after Walker's request for an attorney. (T. 132-42) Walker moved pretrial to suppress these statements as having been obtained in violation of his Sixth Amendment rights to counsel. This motion to suppress was denied by the district court. (T. 145) At trial the prosecutor introduced the alleged statement of Walker and received from the Court an instruction to the jury that such presumably false exculpatory statements could be viewed by the jury as evidence of a consciousness of guilt on the part of Walker. (R. 39, T. 797-98)

In his charge to the jury, over the objections of defense counsel, the Court commented that the jury was entitled to take into consideration the fact that he "is the defendant and the very keen personal interest that

he has in the results of your verdict." (R. 032, T. 853-54)

In final argument the prosecutor commented repeatedly on the alleged extrinsic offenses that Walker had allegedly related to Rummell. Such comments were made over the objections of defense counsel. (T. 835-36)

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This was a prosecution in the district court for alleged violations of title 18, United States Code, section 241.

REASONS FOR GRANTING THE WRIT

ISSUE I.

Whether the Court of Appeals erred in affirming Walker's conviction when federal prosecutors violated his speedy trial rights by maneuvering to have appellant prosecuted in two state counties successively, then in an effort to defeat the actions of a state court to apply as a bond provisions and speedy trial statute to his case, they resumed prosecution of the appellant, denying his right to bond, state and federal speedy trial rights, and credit for time served.

An individual's right to a speedy trial "is one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 995, 18 L.Ed.2d 1 (1967); *see also Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972). This "fundamental" right to a speedy trial guaranteed by the Sixth Amendment is applicable in State criminal pro-

ceedings through the Fourteenth Amendment. *See, e.g., Klopfer,* supra.

This right of speedy trial is "intended to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay in the criminal process." *Dickey v. Florida,* 398 U.S. 30, 42, 90 S.Ct. 1564, 1571, 26 L.Ed.2d 26 (1970) (Brennan, J., concurring).

This Court has specified the interests which are served by the Speedy Trial Clause in *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971):

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. *See also Barker v. Wingo, supra,* 407 U.S. at 532-533.

Most recently the Supreme Court has reaffirmed this view in *United States v. MacDonald,* 456 U.S. 1 (1982):

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is

> protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

The case law is clear that arrest triggers the right of a speedy trial. *United States v. MacDonald, supra; Dillingham v. United States,* 423 U.S. 64, 93 S.Ct. 303, 46 L.Ed.2d 205 (1975).

The prosecution as well as the Court have an "affirmative constitutional obligation" to bring a defendant to trial in a timely manner. *Dickey v. Florida, supra,* at 37-38; *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *Cain v. Smith,* 686 F.2d 374 (6th Cir. 1982). To satisfy this "constitutional duty" a prosecutor must make "a diligent good-faith effort" to try a defendant promptly. *Moore v. Arizona,* 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973). Courts must scrutinize with particular care any delay which occurs after a speedy trial is demanded. *Cain v. Smith, supra* at 382; *United States v. Carini,* 562 F.2d 144 (2nd Cir. 1977); *United States v. New Buffalo Amusement Corp.,* 600 F.2d 368, 377-78 (2nd Cir. 1979). When a defendant is incarcerated, a prosecutor's constitutional duty is particularly compelling. *United States v. Calloway,* 505 F.2d 311, 316 (D.C. Cir. 1974); *Tucker v. Wolff,* 581 F.2d 235, 237 (9th Cir. 1978); *Smith v. Mabry,* 564 F.2d 249 (8th Cir. 1977).

The burden is the prosecutor's to explain the cause for pre-trial delay. Failure to explain such delay weighs

against the prosecution. See *United States v. Avalos,* 541 F.2d 1100 (5th Cir. 1976); *Jones v. Morris,* 590 F.2d 684, 686 (7th Cir. 1979); *Morris v. Wyrick,* 516 F.2d 1387, 1390 (8th Cir. 1975). Moreover, delay which was calculated to obtain an advantage over the accused is weighed heavily against the state. *Barker v. Wingo, supra,* at 514; *United States v. Marion, supra,* at 325.

Walker remained in custody from July 21, 1981, the date of his arrest, continuously to the date of his federal trial, June 10, 1982. However, he was not formally taken into federal custody until March 31, 1982, when United States Marshals picked him up from the Hidalgo County Jail. For approximately nine months, Walker was incarcerated on state capital murder charges in Travis and Hidalgo counties. These state prosecutions were agreed to, encouraged and fostered by the United States Attorney's Office for the Western District of Texas and federal investigating agents. (Gov. Ex. 12, T. 16-17, 18, 28, R. 347, 261-63, Def. Ex. 1, J)

It is true that both the State and federal governments could have individually prosecuted Walker successfully for the same case without amounting to double jeopardy. *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *United States v. Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed.2d 314 (1922). However, our dual system of government has been limited where overlapping prosecutorial powers of the two forums "whip saw" the accused to the prejudice of his constitutional rights. *See United States v. Cabral,* 475 F.2d 715 (1st Cir. 1973). One such example is *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) in which this Court rejected

the "Silver Platter" Doctrine which had permitted evidence in federal prosecutions which had been illegally seized in violation of the Fourth Amendment by State police. In addition, in *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) this Court barred the use of statements obtained under a grant of immunity in one forum from being used against the immunized witness in another forum. This sensitivity to the problems inherent in a dual sovereignty has led the Supreme Court to permit the Department of Justice to undo federal prosecutions where the same defendants have been previously prosecuted for substantially the same offense in state court. *See Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977); *see also United States v. Tanu*, 589 F.2d 82 (2nd Cir. 1978).

Moreover, this is not a case in which the United States Attorney's Office originally intended to bring a second prosecution against Walker. Instead, the intent of the United States Attorney's Office was to encourage and to aid the State authorities in their capital murder prosecution of Walker. It is clear that under State law, absent continuances being granted to the State, a defendant charged with capital murder is not eligible for bond. *See* Tex. Constitution, art. I, Sec. 11 (1876). However, the Federal Bail Bond Reform Act, 18 U.S.C.A. § 3146, *et seq.*, does not automatically bar from bond eligibility those charged with civil rights violations which result in death.

The Fifth Circuit in *United States v. Avalos*, 541 F.2d 1100 (1976) specifically condemned "court shopping" where federal agents changed from the District of Colum-

bia courts to the Florida federal district courts in order to find amiable prosecutors who would "sponsor" the testimony of a questionable witness. (*Id.* at 1112). The District Court of Columbia Circuit specifically condemned similar federal forum shopping in *United States v. Lara,* 520 F.2d 460 (D.C. Cir. 1976). Similarly the Fifth Circuit in *United States v. Nixon,* 634 F.2d 306, 309 (1981) and *Gravitt v. United States,* 523 F.2d 1211, 1215, n. 6 (1975) concluded that:

> "[F]or purposes of determining when the right to speedy trial attaches the basis for the arrest is critical." (emphasis in original)

However, in both *Gravitt* and *Nixon* the defendants were originally arrested on State warrants involving different and independent crimes from those on which they were subsequently charged in federal court unlike the case at bar.

Specifically, this Court concluded in *Nixon, supra,* at 309:

> Of course, if the second charge is but a part of or only gilds the initial charge, the initial arrest would start the critical period for trial. As the Seventh Circuit observed in *DeTienne*:
>
> > '[I]f the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses.' *United States v. DeTienne,* 468 F.2d 151, 155 (7th Cir. 1972).

The four factor test of *Barker v. Wingo, supra,* at 533, which serve as *ad hoc* guidelines is: (1) the length of the delay (2) the reason for the delay (3) the defendant's assertion of the speedy trial rights and (4) prejudice to the defendant. Walker's approximately nine months of incarceration in the case at bar should satisfy this first test.

The reason for the delay in the case at bar under the second prong of *Barker* is for no other reason than tactical advantage. There has never been any attempt by the prosecutor to justify the delay for the purposes of investigation or to augment the federal case in any way. The civil rights case against Walker was neither a complex conspiracy, nor did it involve lengthy investigation. The case was solidified and finalized once Rummell gave his information to the prosecutors and an identification proceeding was conducted in July 1981 following Walker's arrest. As the Fifth Circuit concluded in *Avalos,* tactical delay weighs heavily against the government. *United States v. Avalos, supra* at 1113. Such an unexcused delay for tactical purposes shifts to the government the burden of showing that Walker was not prejudiced. *See* generally *Arrant v. Wainwright,* 468 F.2d 677, 680 (5th Cir. 1972).

Moreover, the prosecution has made no attempt to show that a reasonable delay enabled it to accumulate evidence necessary to make out a prima facie case against Walker as was argued in *United States v. Rosson,* 441 F.2d 242 (5th Cir. 1971).

The third prong of *Barker*—the assertion of the speedy trial right—is repeatedly satisfied by the record in both the State proceedings as well as the case at bar. Not only did Walker attempt to speed his trial along in both the

State and federal forums, he repeatedly moved for bond reductions which have long been considered as an attempt to forestall violations of an individual's speedy trial rights. Judge Bazelon in *United States v. Calloway*, 505 F.2d 311, 316 (D.C. Cir. 1974) recognized that the rights of speedy trial and bail protect roughly the same interests. *See* also *Cain v. Smith, supra* at 384 (a demand for reasonable bail is the functional equivalent of a demand for a speedy trial).

The last factor under the *Barker* test—prejudice to the defendant—is evident because Walker was in custody without trial for nine months on a capital murder charge. As the Fifth Circuit Court noted in *Avalos*:

> Were the appellants shown to have suffered particular hardships *or was this a capital case, where the anxiety would justifiably be more severe,* we would accord the appellants' allegations greater weight. *United States v. Avalos, supra* at 1115. (emphasis added)

In addition, although Walker has shown demonstrable and substantial prejudice of the sort that the Sixth Amendment is designed to protect against, the Supreme Court clearly indicated in *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 118, 38 L.Ed.2d 183 (1973) that an affirmative demonstration of prejudice was not essential to prove a denial of an accused's constitutional right to a speedy trial. Prejudice was only one of the *Barker* factors to be considered.

The Fifth Circuit concluded that the actions of the federal prosecutors did not violate Walker's speedy trial rights because:

> The general rule is that ordinarily the federal constitutional right to a speedy trial arises after a *federal* accusation against the defendant is made, so that a prior state arrest based on the same facts as the subsequent federal charge does not implicate the federal constitutional guarantee. [citations omitted] *United States v. Walker,* Appendix A, p. 13.

However, Walker's position is that the undisputed cooperation by federal and state authorities to violate the state and federal speedy trial and bond provisions removes his case from the general rule of federalism. The Sixth Amendment is nullified for both state and federal prisoners unless there is an exception made for exceptional cases.

For these reasons the Appellant would respectfully urge that this Court overrule the denial of his motion to dismiss the indictment for the prosecutor's violation of his speedy trial right and remand this case to the District Court with directions to dismiss the indictment.

ISSUE II.

Whether the Court of Appeals erred in affirming Appellant's conviction where the alleged conversations with the Appellant about previous alleged instances of his violent conduct should have been excluded because the prosecution failed to lay a predicate to show relevancy under Federal Rule of Evidence 404(b) and failed to show that the substantial prejudice of such "hit man" evidence was outweighed by any probative value under Rule 403.

The admission of extrinsic offenses under this rule in federal court is a question that frequently arises. As such, this is an important question of federal law "which has not

been, but should become seettled by this court. . . ." Title 28, United States Code, Revised Rules of the Supreme Court of the United States, Rule 17.1(c). As such, it is an issue which is appropriate for consideration and should be settled by this Court.

The general rule embodied in the common law and adopted by the Federal Rules of Evidence is that evidence of extrinsic offenses may not be introduced solely to show that an accused has a propensity to commit crime. *Michelson v. United States,* 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948); *United States v. Beechum,* 582 F.2d 898, 910 (5th Cir. 1978) (en banc).

In *Beechum, supra,* the Fifth Circuit Court established the standard test for admissibility of extrinsic acts under Rule 404(b). Specifcally, it required the proponent to lay a predicate to show: (1) relevancy, i.e., a nexus between the alleged extrinsic offense and an issue in contention with respect to the charged offense; (2) sufficient evidence to convince the district court that a jury could find that the defendant in fact committed the alleged extrinsic offense pursuant to Federal Rules of Evidence 104(b); (3) the proponent must demonstrate that the probative value of the proffered evidence outweighs the prejudice to the accused (Rule 403).

In the case at bar the prosecutor introduced, primarily through the testimony of Co-Defendant Rummell, several different types of references to alleged extrinsic offenses supposedly committed by Walker. According to Rummell, over some unspecified period of time, Walker supposedly told him: (1) about war stories, i.e., that "he had killed quite a few people in the war [Appellant was a soldier in Viet Nam] and was not opposed to doing so" (T. 435);

(2) Walker had supposedly shot someone in the knee cap at some unspecified period of time, (T. 435-438); (3) Walker has supposedly performed services regarding "influencing people to pay money and services for drug dealers requiring something of a violent nature" (T. 438); (4) Walker had previously accompanied Rummell to retrieve a pickup truck obtained from Rummell's friend and Co-Defendant Stottler when Rummell had anticipated trouble regarding the truck. (T. 436) All such testimony was obtained by the prosecution on re-direct examination of Rummell and outside the scope of cross-examination. It was obtained over repeated defense objections. (T. 435-39) In addition, the prosecutor asked Rummell about Walker's reputation for violence in the community. (T. 435) Only number four (4), the pickup truck incident, was corroborated by any evidence other than Rummell's testimony about past conversations.

The prosecution had no evidence that Walker ever participated in any war time killings, ever shot anyone in the kneecap, ever provided any "services" for drug dealers or acted in a violent way to harm anyone. There is no evidence that Walker was ever arrested for, much less convicted of, any such offenses. (R. 077) At best, assuming any such statements to Co-Defendant Rummell were made, they amount to "braggadocio," that is, conversations with a "big-time" drug dealer like Rummell about how "tough" Walker pretended to be. Moreover, the instance with Stottler's truck was equally ambiguous. The situation, according to Rummell, was potentially dangerous and self-defense might be appropriate, in view of the fact that the truck was wrongfully taken.

Nevertheless, if the incident with Stottler's truck actually occurred, it was being offered by the prosecution to

show only that Walker was a bad and violent person who carried a weapon at some time in the past. Such evidence is impliedly evidence of bad character which has been held by this Court to be inherently prejudicial and violates Rule 404(b).

In *United States v. Dothard*, 666 F.2d 498 (11th Cir. 1982) the Eleventh Circuit considered an analogous situation. Dothard was charged with making a false statement with intent to deceive in violation of 18 U.S.C.A. § 1001. The prosecution introduced evidence that Dothard had previously lied to a State license examiner regarding his status as an employee of the Veterans Administration. The Court of Appeals concluded that the conduct of the defendant as attested to by the State examiner was inherently ambiguous and that no nexus existed between the extrinsic act alleged and the crime charged even though theoretically they both involved "lying." Moreover, the prosecutor was not introducing the evidence to evaluate the defendant's state of mind at the time of the charged offense but to try his propensity to lie. Lastly, there was a temporal remoteness which existed between the alleged extrinsic offense and the trial.

Appellant's case is distinctly analogous to *Dothard* because it is ambiguous whether Walker actually committed such an extrinsic offense or if it was merely Rummell's subjective opinion based on their alleged conversations. Moreover, based on Rummell's testimony about the violence of the man who had taken Stottler's truck, it is ambiguous whether Rummell's, and allegedly the Defendant's, actions were excessive.

Most importantly, the prosecution failed to show that there was a nexus between Walker's allegedly violent talk

and any actual extrinsic violent acts which could be linked to the offense charged. Moreover, there is no showing by the prosecutor of when these alleged conversations occurred in proximity to the offense charged. When defense counsel attempted to object and to require that such a predicate be laid outside the presence of the jury, his attempts were opposed by the prosecutor and overruled by the District Court. (T. 435-439)

The Fifth Circuit has previously indicated that a showing of intent to assault such as in the alleged Stottler-truck-incident proves little, if anything, about an intent to assault at some subsequent date. In *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974) the Court concluded:

> . . . [P]rior crimes involving deliberate and carefully premediated intent—such as fraud and forgery—are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent—such as [the] assault [under 18 U.S.C. § 111] before us.
>
> " * * * [T]he evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent. Indeed, such prior crimes have less to do with the type of specific intent that may arise later, as in fraud, than they do with the defendant's overall disposition or character * * *."

505 F.2d at 923. *See also United States v. Bettencourt*, 614 F.2d 214 (9th Cir. 1980) (prior evidence of assault on police officers was not admissible in subsequent similar offense which occurred two years later). Consequently, such testimony is insufficient to show that such alleged statements by Walker were relevant to the elements of the

federal offense charged or that Walker ever in fact *did* such extrinsic acts.

Moreover, the contended evidence fails the requirements of Rule 403, that the prejudice not outweigh the probative value. In *United States v. Mitchell,* 666 F.2d 1384, 1390 (1982) the Eleventh Circuit followed *Beechum* and found extrinsic offense evidence admissible but indicated that a different ruling might be had where:

> Extrinsic offense evidence is of a heinous nature likely to incite the jury to an irrational decision or otherwise run afoul of Rule 403.

See also United States v. Cochran, 546 F.2d 27 (5th Cir. 1977).

In the case at bar the prosecution felt that it had a strong case against Walker but chose to use Rummell's testimony about such "hit man" conversations anyway. Especially in San Antonio where the spectre of Judge Wood's murder is felt very strongly, such testimony, if believed, would be of a peculiarly heinous nature and inevitably damn Walker outright.

Such evidence was a gratutious afterthought by the prosecutor as is evidenced by its emergence on re-direct instead of direct examination. Such a flippant attitude towards the Federal Rules of Evidence should not be condoned by this Court. Evidence that Walker *said* violent things in the past is evidence that he *may say violent* things in the future and no more. Nevertheless, the prosecution extrapolated such evidence into an implied string of violent acts which it could not prove.

The Court of Appeals erred in concluding that such evidence was relevant to the issue of Walker's intent to

involve himself in such possible acts of violence as those that Rummell was contemplating against Overstreet. This conclusion is incorrect because there was no demonstration that Appellant had in fact committed such offenses or would in the future. Rummell's statements about such alleged conversations were self-serving and uncorroborated. They did not show a propensity to violence by Walker, or that Rummell could reasonably believe that Walker would aid in the actions against Overstreet. For these reasons Appellant respectfully prays that this Court grant his application for writ of certiorari to consider this substantial federal issue.

ISSUE III.

Whether the Court of Appeals erred in concluding that Walker's post-arrest statements that he did not know Boyce Rummell were properly admitted against him when they were obtained after he had received his Miranda warnings and requested an attorney and when he was misled into believing that it was mandatory that he answer such "background information."

In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) this Court ruled again that an accused who had been given his Miranda warnings and had expressed a desire to have counsel present may not be further questioned by the authorities until counsel has been made available to him, unless the accused himself initiates any further conversations with the police. *Accord, Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In he case at bar Walker was first read his Miranda rights by the New Mexico police following his arrest. (T. 124) There was no interrogation of Walker at that time. However, when he was driven to the State police office he was questioned by Captain Bob Carroll of the New Mexico State Police. (T. 126, et seq.) Captain Carroll explained to Walker that he would have to give information regarding his background because it was required by the State police. (T. 129) Walker was told that this information sheet was mandatory and standard procedure. (T. 136) Captain Carroll made no specific warnings that the information that Walker was giving could be used against him. (T. 132-33) During this time, Walker stated that he needed a good attorney. (T. 137) Then, according to Captain Carroll's testimony:

> Mr. Walker asked what he was charged with, and I told him that he had been charged with murder from the State of Texas, and I asked him if he knew a Charlotte or Charlene Elliott, and he said no, and I asked him if he knew a Boyce Rummell, and he said no. That was the extent of it, and then, we went back to the background.

(T. 128)

The Fifth Circuit has repeatedly held that standard booking procedures do not require Miranda warnings so long as the questions asked do not relate, even tangentially, to criminal activity. *United States v. Menichino,* 497 F.2d 935 (5th Cir. 1974); *United States v. Henry,* 604 F.2d 908, 915 (5th Cir. 1979); *see also United States v. Glen Archila,* 677 F.2d 809, 815 (11th Cir. 1982) and cases cited therein. In the case at bar the incriminating questions asked of Walker were in no fashion

part of the standard booking procedures of the New Mexico State Police. Nor were they an appropriate or a necessary response to Walker's question asking what he was charged with.

These police questions were particularly damaging to him because, not only were they emphasized before the jury by the prosecutor through Captain Carroll's testimony, but the prosecutor obtained a specific instruction from the District Court directing that the jury could infer guilty knowledge from Walker's "false exculpatory statements" that he did not know Boyce Rummell. On the stand, Walker attempted to explain that he denied knowing Rummell because he was only acquainted with Rummell's nickname "B. A.". Rummell confirmed that he is known by that name. (T. 450)

ISSUE IV.

Whether the Court of Appeals erred in affirming Appellant's conviction when the District Court instructed the jury that they should remember in evaluating testimony that appellant had a keen personal interest in the outcome of the trial.

The Seventh Circuit in *United States v. Saletko,* 452 F.2d 193 (7th Cir. 1971) has specifically held that it is preferable not to single out the defendant by any instruction referring to his interest in the outcome of the case. *United States v. Saletko* cited with approval in 1 Devitt and Blackmar, *Federal Jury Practice and Instructions* § 17.12 (3rd Ed. 1977); *See* also *United States v. Long,* 449 F.2d 288 (8th Cir. 1971); *United States v. Martin,* 525 F.2d 704 (2nd Cir. 1975).

While some courts have with some hesitation approved of the instruction in the past, *see United States v. Haney*, 429 F.2d 1282 (5th Cir. 1970), such an instruction is particularly inappropriate in a case such as the one at bar. Here the primary evidence against Walker was from Co-Defendant Rummell, who had as great, if not greater, stake in the proceedings as did Appellant. In fact, a State District Attorney had threatened Rummell that he would disregard Rummell's plea bargain with the federal authorities and re-indict him for capital murder if Rummell so much as permitted himself to be interviewed by defense counsel again without the District Attorney present. (T. 450, 451) In addition, Rummell's plea bargain with the federal authorities included an agreement not to use any statements by Rummell to prosecute Rummell's wife's family who were thought by the authorities to be deeply involved in drug trafficking. (T. 398, 403, 775) A Hidalgo County indictment for conspiracy to commit capital murder was pending against Rummell at that very time that he testified, which was later dismissed.

To give an instruction such as the one requested by the government under these circumstances unduly weighs down the defense and lightens the burden of the government. (T. 790) Under the peculiar facts of this case, this Court should conclude that the District Court abused its discretion in giving this particular instruction. Cf. *United States v. Lance*, 536 F.2d 1065, 1068 (5th Cir. 1976).

ISSUE V.

Whether the Appellant's eight month pre-trial state incarceration was the product of sufficient action by federal law enforcement officials as to justify giving appellant credit on his federal sentence for the time he spent in state custody pursuant to 18 U.S.C.A. § 3568.

The facts in the case at bar indicate that Appellant's pre-trial State confinement was essentially the product of a decision by the federal prosecutors to delegate the prosecution of Walker to the State in order to make him eligible, at least in theory, for a sentence of capital punishment. (T. 16-19)

Joe Turner, then the Assistant District Attorney in charge of Walker's prosecution in Travis County and soon thereafter an Assistant United States Attorney for the Western District, testified pre-trial. (T. 15) Mr. Turner testified that the United States Attorney's Office referred the case over to the Travis County District Attorney's Office involving Mr. Rummell. Specifically, Turner explained:

> A. They had notified our office that since it was capital offense, since the federal prosecution could not seek the death penalty *that we should handle*—might be interested in handling that case against Mr. Rummell, that is when we decided to seek an indictment against him.
> Q. All right. And, that was prior to any charges being filed against Mr. Boyce Wayne Rummell in Federal Court, isn't that correct?
> A. Oh, sure.

(T. 18) (emphasis added)

Moreover, Turner testified:

A. —we had the individual who we knew had hired the killer, and I was interested in getting the person responsible doing the actual shooting as the Prosecutor representing the people of Travis County.
Q. All right. Is it your testimony, then, that it was your direction that United States Attorney's Office reached a plea bargain agreement with Mr. Boyce Wayne Rummell?
A. I am not sure if it was done under anyone's direction. It was more or less—we had agreed that it was a proper settlement—what the proper punishment ought to be. Of course, I was going to need the cooperation of the Federal people who were going to plea [sic] him to Federal time—to a Federal offense—Rummell, that is. And also had dismissed by case. Of course, any agreement to plead him in Federal Court would have to be approved by Carl Pierce, the Assistant United States Attorney in Austin.
Q. All right. Would it be fair to say, then, back before July 21, 1981, you and Mr. Pierce worked together and reached an agreement with regards to the prosecution of Boyce Rummell?
A. Where do you get the July 21 date?
Q. That is the date of the indictment naming Mr. Lloyd Chris Walker.
A. I would say that our agreement would have to be prior to that time.

(T. 18-19)

The original capital murder indictment against Boyce Wayne Rummell was brought to the District Attorney's Office for Travis County by the United States Attorney's Office. (T. 23-24) The Federal Drug Enforcement Agency

and other agents of the United States provided Mr. Turner with information pertaining to the shooting. Such information included the Alcohol, Tobacco and Firearms reports pertaining to the .30-30 rifle which was alleged to be the murder weapon. (T. 29) To this federal investigation, Mr. Turner added the information he obtained from Boyce Rummell as a consequence of the state/federal plea bargain. (T. 28)

Prosecutor Turner testified that he specifically got the "okay" of Assistant United States Attorney in charge of Walker's case, Archie Carl Pierce, prior to dismissing his case in Austin and transferring Walker's prosecution to Hidalgo County. (T. 35)

In February, 1982, after Joe Turner had become an Assistant United States Attorney for the Western District, he continued to monitor the Hidalgo County case. (T. 35-36) He was informed in February by the prosecutors in Hidalgo County that the case was going to have to be dismissed because the trial judge was going to rule against them with respect to State speedy trial issues. (T. 40-41) Turner specifically asked the Hidalgo County District Attorneys not to dismiss Walker's case until a federal indictment could be obtained. (T. 43) Consequently, Walker remained in State custody for at least one more month (from February to March 30, 1982) until the Hidalgo County case was dismissed and the federal prosecution was begun on March 29, 1982.

In sum the federal prosecutors: (1) referred the case to the Travis County District Attorney's Office; (2) okayed the transfer to Hidalgo County for prosecution; (3) engineered the transfer back to the federal authorities for prosecution.

The Appellant would urge this Court the activities of the federal prosecutors were so closely intertwined with those of the State officials that they were essentially inseparable. But for the actions of the federal prosecutors, the underlying plea bargain with Boyce Rummell to permit him to serve his sentence in federal custody would never have happened. The Alcohol, Tobacco and Firearms agents were closely involved in the underlying investigation as well as the F.B.I. No step was taken to initiate or to keep the State prosecutions alive unless it had the "approval" of the federal prosecutors. Walker would respectfully urge this Court that the active participation of the federal prosecutors in his State cases justifies the conclusion that his state custody was the "functional equivalent" of his federal custody. Consequently, credit under 18 U.S.C.A. § 3568 should be given Walker for the approximately eight months that he served. Counsel for Walker raised this issue before the District Court at sentencing and no action was taken. (T. 872) The court of appeals erred in concluding that the Appellant's state custody was not the functional equivalent of federal custody.

ISSUE VI.

Whether the Appellant's motion in arrest of judgment should have been granted because the alleged object of the conspiracy, Michael Overstreet, was being compelled to testify under threat of contempt and was not in "free exercise or enjoyment of any right secured to him by the constitution" as is jurisdictionally required by 18 U.S.C.A. § 241.

18 U.S.C.A. § 241 states in part:

> If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . .

Congress specifically intended:

> The bill [1968 Civil Rights Act which enacted 18 U.S.C.A. § 241] would protect persons who urge or aid participation in the protected activities, as well as those who engage in speech or peaceful assembly opposing denial of the opportunity to so participate. Persons who have duties to perform with respect to the protected activities—such as public school officials, restaurant owners, employers or voter registration officials—would also be protected.

1968 U.S. Cong. and Admin. News, p. 1839.

A survey of the case law enacted pursuant to this statute and its predecessors indicates that Congress has repeatedly intended that the "free-exercise" of these rights be protected and no provision has been made historically for the protection of the compulsory exercise of these rights.

Consequently, Walker's motion in arrest of judgment should have been granted by the District Court because the case fails to satisfy one of the necessary elements essential to proof of a violation pursuant to 18 U.S.C.A. § 241.

CONCLUSION

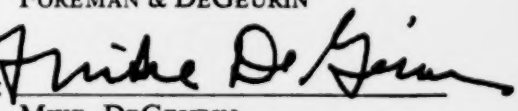
Appellant Walker would urge this Court that his case merits consideration on writ of certiorari because of the substantial federal questions involved. This is especially true as to the speedy trial question and the proper application of Rule 404(b) to the facts of his case.

PRAYER FOR RELIEF

For these reasons the Appellant respectfully prays that this Court will grant his application for writ of certiorari in order to review the substantial issues which have been raised.

Respectfully submitted,

FOREMAN & DEGEURIN

By: 

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1430

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LLOYD CHRIS WALKER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(July 15, 1983)

Before WISDOM, TATE and GARWOOD, Circuit Judges.

TATE, Circuit Judge:

The defendant-appellant Walker appeals his conviction and sentence for life imprisonment based upon his alleged involvement in a conspiracy to intimidate a witness who was going to testify before a grand jury. 18 U.S.C. § 241.[1] Two innocent people were killed by a shot fired into a crowded bar that (according to the government witness) was intended to kill Michael Overstreet, the potential wit-

1. 18 U.S.C. § 241 (1968) proscribes the actions of "two or more persons" to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . ."

ness. Walker contends that he was not hired as a "hit man" to kill Overstreet and did not participate in a plan by Rummell, the named alleged coconspirator, to prevent this witness' appearance before the grand jury to testify as to the other alleged coconspirators' involvement in drug crimes. In Walker's most forceful contention, he argues that testimony by Rummell, who repeated Walker's admissions to prior involement in acts of violence and testified to a specific instance in which Walker accompanied two of the drug dealers as armed protection, constituted evidence of extrinsic bad acts placed before the jury in violation of Fed. R. Evid. 404(b). Finding that the district court did not abuse its discretion in admitting Rummell's testimony under the circumstances shown, and that Walker's other contentions are without merit, we affirm the conviction below.

I. *The Extrinsic Acts Issue: Context Facts*

In trial, Walker admitted to being present at the shooting at Pepe's Bar in Hidalgo County, Texas, and to fleeing with Rummell. He testified, however, that Rummell did the shooting and that he, Walker, had come to Hidalgo County at Rummell's request and expense solely to purchase a large quantity of marijuana. Walker thus denied any knowledge of or involvement in any conspiracy to intimidate or kill Overstreet.

Rummell, who agreed to testify against Walker in the federal proceedings in return for an agreement to dismiss state murder charges and who had pleaded guilty to the conspiracy to violate Overstreet's rights, testified on direct examination by the prosecution that he and other partipants in drug smuggling feared the impact of Overstreet's

agreement with the government to testify about their activities. Rummell testified that, desperate because of the upcoming grand jury date for Overstreet's testimony (and unsuccessful in two prior attempts to assassinate him) he, Rummell, from Hidalgo had telephoned Walker (who was a non-participant in the drug smuggling in Austin), with the intention of hiring him to kill Overstreet. He testified that he was "under the impression that Mr. Walker would assist . . . in this matter." Rummell further stated that in this telephone conversation he told Walker that he "needed [Walker's] assistance" and that Walker agreed to help, although without specifying the purpose. Walker then flew a private plane to join Rummell a few days before the shooting. According to Rummell, during those days they expressly discussed details of killing Overstreet and traced their victim to Pepe's bar. Rummell and Walker stayed several hours at the bar observing Overstreet; Rummell testified that as they left around midnight, Walker shot at Overstreet from the parking lot.

On cross-examination the defense questioned Rummell with respect to his agreement with Walker: whether Rummell actually had planned to kill Overstreet at the time he called Walker and had told Walker "exactly what the situation was." Rummell responded that he did not talk to Walker about shooting anyone until Walker arrived in Hidalgo County and that no one was present during any conversation he had with Walker discussing the shooting. On redirect, the prosecution questioned Rummell about why he would call Walker, a person uninvolved with the drug investigation, for the purpose of having him kill someone without specifically asking him if he would do so. At Walker's objection, the court did

not permit Rummell to testify about Walker's reputation.[2] The trial court did allow Rummell to testify, however, as to why he had telephoned Walker, in response to the prosecutor's bench explanation that Rummell's prior relationship with Walker was relevant to explain what had caused him to call Walker to fly immediately to the scene to kill somebody. Walker continued to object to introduction of any evidence concering his prior activities or his past relationship with Rummell.

Rummell testified that on an earlier occasion, prior to the drug transaction leading to the conspiracy to kill Overstreet, Walker had accompanied Rummell and his friend Statler (later to be involved in the drug smuggling) as armed "insurance [and] protection" to retrieve Statler's pickup truck that had been taken by a supposedly dangerous person.[3] Rummell testified that during that incident he had mentioned to Walker that he "was having a problem with a gentleman that was going to testify against a group of people", and that Walker replied that "if I [Rummell] needed any help, to let him know."

In addition, Rummell related stories that Walker allegedly told him on several undated prior occasions before Rummell telephoned him to ask him to come to Hidalgo. According to Rummell, Walker boasted about killing people in the Viet Nam war and being "not opposed to doing so" in the future; Rummell stated that Walker had

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2. At the close of trial and at the prosecution's request, the court gave an instruction that the jury should not consider "for any purpose" Rummell's "testimony concerning his opinion of Mr. Walker's reputation."

3. Later in the trial, coconspirator Statler also testified that Walker, who had a gun in his car, accompanied Statler and Rummell to get the truck.

bragged about providing services "influencing people to pay money" and services for drug dealers "that would require something of a violent nature"—specifically (in the only instance about which Rummell could remember hearing), shooting a person in both knees.

In his testimony, Walker denied telling Rummell these stories about any prior violent activities and stated that these events had not occurred; however, he did not deny or discuss the pickup truck incident. He testified that in the telephone call precipitating his visit to Hidalgo, Rummell did not mention an agreement to kill Overstreet or perform any act of violence; rather, Rummell said he was receiving a load of marijuana and offered to sell some of it to Walker. Walker stated that he went to Hidalgo, paid Rummell $3,000 for marijuana, and accompanied Rummell in order to facilitate the drug sale; he testified further that he had no knowledge of Rummell's plan to kill Overstreet until after Rummell shot into the bar. On rebuttal, Rummell reiterated that Walker had fired the gun, and testified that he did not offer to involve Walker in a non-existent marijuana deal, and that Walker did not pay him $3000.

At the end of trial, Walker objected to the prosecution-provided limiting instruction regarding Rummell's attempt to testify about Walker's reputation (*see* note 2 *supra*) and instead suggested a charge requiring that the jury disregard *all* of Rummell's testimony concerning Walker's prior acts or statements. The defense did not propose an instruction to limit the jury's permitted uses of the evidence of Walker's prior acts. The only charges before the jury with respect to these extrinsic acts were the prosecution provided instruction that it not consider

"for any purpose" Rummell's "testimony concerning the defendant's reputation" and that "the defendant is not on trial for any act or conduct or offense not alleged in the indictment."

II. *The Extrinsic Acts Issue: Resolution*

Walker contends that Rummell's testimony concerning his alleged statements of past violent acts and the pickup truck incident should have been excluded as improperly admitting evidence before the jury in violation of Fed. R. Evid. 404(b). That rule prohibits introduction of evidence of "other wrongs" to prove bad character or propensity to commit the charged offense, but permits its use for relevant purposes, such as to show motive, opportunity, intent, plan, and knowledge.[4] The proponent of the evidence must satisfy a two-step analysis set forth in United States v. Beechum, 582 F.2d 898, 911-13 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244 (1979). The evidence of a prior wrong may be introduced (1) if it is relevant to an issue other than the defendant's character, and (2) if its probative value is not substantially outweighed by its undue prejudice.[5]

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4. Fed. R. Evid. 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. *Beechum* provides that the second step of Rule 404(b) analysis is whether the evidence satisfies Fed. R. Evid. 403. This rule provides, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."

Walker argues that he did not brag to Rummell about killing or maiming, that the prosecution did not offer sufficient evidence that any of the events in Rummell's testimony actually occurred, and that these acts—and the uncontested incident involving the retrieval of the pickup truck—are relevant to no other purpose except to show Walker's bad character. Moreover, he urges, the prejudicial nature of the evidence of prior violent activities outweighs its probative value. The prosecution contends, inter alia, that Rummell's testimony was relevant to explain why Rummell telephoned Walker, especially in view of the cross-examination of Rummell that cast doubt upon the telephone call as being in aid of a conspiracy to kill Overstreet.

We now evaluate Rummell's testimony by the *Beechum* analysis.

A.

If there is no reasonable basis for finding that the extrinsic offense occurred, it may not ordinarily be admitted. *Beechum*, 582 F.2d at 912-913. (However, in *Beechum* the court was referring to a test for the use of an extrinsic act as evidence of intent; it had previously noted, however, that there may be distinguishing factors in the use of extrinsic evidence to prove issues other than that of intent. *Id.*, 582 F.2d at 911 n. 15.)

The jury could have reasonably believed, from Rummell and Statler's testimony, that Walker escorted them during the pickup truck incident. Similarly, a jury could make a positive credibility determination and reasonably believe that Walker told Rummell about his war experiences and violent activities (including a kneecapping)

in aid of drug dealers—conceding if only for present purposes, that these adverse admissions by Walker could be considered other "wrongs" by him within the purview of Rule 404.

The prosecution contends, however, that Walker's statements were not offered as proof that these incidents occurred, but argues that by telling them to Rummell, Walker had indicated his availability to assist Rummell by coercive or violent acts. The testimony thus derives its relevance to the present issue to which the extrinsic act is addressed—in this case, Walker's coming to Hidalgo and agreeing to participate in a conspiracy to kill Overstreet—from the mere fact that Walker made these statements, not from the truth or falsity of the content of the communication. *See* United States v. Bobo, 586 F.2d 355, 372 n.23 (5th Cir. 1978), *cert. denied sub. nom* Rowan v. United States, 440 U.S. 976, 99 S.Ct. 1546 (1979). In *Bobo*, where a defendant was charged with conspiracy in a drug operation, we found that a coconspirator's testimony, in which he related a conversation he had with the leader of the ring where the leader said that the defendant had been arrested on a drug charge, was not offered to show the defendant's bad character. Rather, the fact that the defendant had been arrested and that the leader believed that as a result the defendant was likely to be the informer in the drug operation—and that the leader trusted his listener enough to discuss an informer problem with him—was relevant to show the existence of a drug conspiracy and in general to bolster the credibility and weight of the testifying coconspirator's testimony. 586 F.2d at 372.

We find that Walker's boasts to Rummell, and Walker's earlier role as companion to Rummell and Statler, are

relevant to the limited issue of Walker's knowledge of and agreement to participate in a conspiracy to kill the grand jury witness. Walker himself brought the issues of knowledge and agreement into contention by inquiring on Rummell's cross-examination as to the actual words used to induce him to fly to Hidalgo, emphasizing that Rummell did not expressly ask him to kill anyone, and implying that Walker did not know of or agree to participate in a conspiracy.[6] Because Walker himself emphasized this lack of express agreement, Walker's prior communication and contact specifically with Rummell—especially where Walker had agreed to help the coconspirators achieve another goal (rescue of the pickup truck) and had indicated willingness to help them against an adverse witness —became relevant to corroborate Rummell's ascribed purpose (questioned by Walker) for his telephone call to Walker. Rummell's testimony also served to some extent to prove that, subsequently, Walker readily and he knowingly agreed to join these same people to achieve another, albeit much more heinous, goal. *See* United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980). Had Walker's cross-examination of Rummell not opened the door to this inquiry, a different issue might be presented.

B.

We now reach the second prong of the *Beechum* inquiry: the application of Rule 403 (*see* note 5 *supra*) to determine whether the probative value of the extrinsic

6. In his subsequent testimony, Walker presented more fully his defense that he came to Hidalgo solely in order to buy marijuana from Rummell and that he did not know of any plan to kill Overstreet.

offense evidence is substantially outweighed by its undue prejudice. The reviewing court assesses the *incremental* probity of the evidence in relation to the other evidence, stipulations, or inferences that have been compiled in the case regarding the issue to which the extrinsic offense is relevant. *Beechum, supra,* 582 F.2d at 914, 916-17. Here, Walker's prior statements to and involvement with the coconspirators were probative of his implicit willingness to act in concert with them, which he contested in Rummell's cross-examination by inquiring as to whether Rummell had explicitly asked Walker over the telephone to kill Overstreet. In light of the doubt cast upon the existence of an agreement in which Walker knowingly joined the conspiracy, prior contacts and concerted action with the coconspirators would tend to prove that Walker understood, at the time Rummell telephoned him, that he was being asked to assist Rummell by coercive and possibly violent means, and also to some extent were corroborative of Rummell's testimony that on arrival in Hidalgo Walker readily agreed to join the conspiracy to kill the witness Overstreet by himself serving as hit man. The extrinsic offense evidence, therefore, would be of weight in the government's proof. Although Walker could be deemed to have agreed to join the conspiracy *after* he came to Hidalgo, the government greatly strengthened its case by establishing the basis for the prior telephonic communication—especially in view of Walker's subsequent defense that he came to Hidalgo for a different purpose.

We have little difficulty in determining that testimony regarding the pickup truck incident was admissible. Its probative value was substantially outweighed by the prejudice it may have caused Walker. This extrinsic act is

not a crime or of a heinous nature, *see Beechum, supra,* 582 F.2d at 917; *McMahon, supra,* 592 F.2d at 876; *Bobo, supra,* 586 F.2d at 372; the act shows little more than Walker's association with and willingness to aid two men who were later involved in the present conspiracy.

However, admission of Rummell's testimony of Walker's bragging is much more troubling. It is incrementally less probative than the pickup truck incident and vastly more prejudicial, because Walker implicates himself in killing and maiming, even though by bravado that may lack credence with respect to the actual occurrence of the events. Nevertheless, the prejudicial effect of this testimony is lessened, since these statements were offered to show only that Walker made the remarks and therefore would understand that Rummell, through innuendo, was asking him to come to Hidalgo and to assist by way of strong-arm tactics. The defense, moreover, did not ask for a limiting instruction to clarify the jury's use of Rummell's testimony.

We find, under these circumstances, that the introduction of Rummell's testimony was not barred by Rule 404(b).

III. *Other Issues*

Walker raises a number of other contentions on this appeal, none of them meritorious:

A. *Sixth Amendment Speedy Trial Guarantee*

Walker was initially arrested by state officials and incarcerated approximately nine months in state facilities on the charge of capital murder of the two persons who

died in the shooting. After the state decided not to bring Walker to trial, the federal authorities charged him with the federal civil rights conspiracy crime for which he has been convicted. Walker contends that the period of delay between his arrest by state officials for murder and his trial in federal court for conspiracy to intimidate grand jury witness Overstreet constitutes a violation of his rights to a speedy trial under the sixth amendment.[7]

Walker does not contend that he did not receive a speedy trial after the federal indictment. Instead, he argues that the state arrest triggers the applicability of speedy trial rights in this case, because the federal authorities worked closely with the state prosecutors from the beginning of the state charge, because allegedly the initial murder charges were a result of federal and state officials' "forum shopping" to take advantage of state law that would keep Walker incarcerated without bail pending trial, and because the federal prosecutor allegedly instigated and used the delay in the state proceedings to its tactical advantage by accumulating evidence and developing Rummell's testimony.

The United States asserts that although it worked closely with the Texas authorities it had no intention initially to charge Walker with a federal offense. Only after the state dismissed the state charges, for reasons of hiatuses in the state prosecution we need not detail here, the government insists, did it intend to or obtain a federal indictment on the conspiracy charge. The evidence supports this contention.

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7. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial."

The general rule is that ordinarily the federal constitutional right to a speedy trial arises after a *federal* accusation against the defendant is made, so that a prior state arrest based on the same facts as the subsequent federal charge does not implicate the federal constitutional guarantee. *See* Hendricks v. United States, 661 F.2d 38, 40 n.1 (5th Cir. 1981);[8] Gravitt v. United States, 523 F.2d 1211, 1215 n.6 (5th Cir. 1975). *Accord,* United States v. Brown, 605 F.2d 389, 395 (8th Cir.), *cert. denied,* 444 U.S. 972, 100 S.Ct. 466 (1979); United States v. Romero, 585 F.2d 391, 398 (9th Cir.), *cert. denied,* 440 U.S. 935, 99 S.Ct. 1278 (1979).

The defendant may attack a *pre*-indictment delay, however, as a violation of his fifth amendment right to due process. United States v. Lovasco, 431 U.S. 783, 788-90, 97 S.Ct. 2044, 2047-48 (1977). The "due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.,* 431 U.S. at 790, 97 S.Ct. at 2049. Here, the government has shown adequate non-oppressive reason for the nine-month delay between state arrest and federal trial, and in addition has not shown any "actual prejudice to the conduct of the defense" or "that the Government intentionally delayed to gain some tactical advantage over [the defendant] or to harass [him]." United States v. Marion, 404 U.S. 307,

8. The *Hendricks* court explained:
> The Sixth Amendment right to a speedy trial arises when a person becomes 'accused' by either indictment, information, or arrest. The [State] arrest . . . , however, did not 'accuse' appellant for purposes of the Sixth Amendment right to a speedy trial in a subsequent *federal* prosecution. To hold otherwise would force federal indictments of state arrestees and stand inconsistent with the doctrine of dual sovereignty that recognizes the validity of successive state and federal prosecutions.

661F.2d at 40 n.1 (citations omitted).

325, 92 S.Ct. 455, 466 (1971). We thus find no merit to the claim of a due process fair-trial violation resulting from the delay between state arrest and federal trial.

B. *Admission of False Exculpatory Statement.*

Walker next contends that reversible error occurred in the government's introduction, after denial of a pre-trial motion to suppress it, of a statement he made at the time of booking that (falsely) indicated he did not know Rummel, the coconspirator. Walker claims that the post-arrest statement should have been suppressed as made after he had invoked his right to consult counsel before further interrogation. Edwards v. Arizona, ____U.S.____, 101 S.Ct. 1880 (1981).

The facts surrounding this contention are: When Walker was found and arrested by state police in New Mexico for the killings in Texas, he was given the *Miranda* warnings of his rights to remain silent and to have an attorney present during questioning. He concedes he did not request an attorney at this time. After Walker was brought to the police station, before the police recorded personal data in the booking procedure, Walker asked, "What in the hell is going on here?" The officer responded that he was charged with murder in Texas and asked if he knew a named victim of the killing or Boyce Rummell, to which Walker answered "No." The police officer then told Walker that was all the information he knew about the case, and proceeded with the questioning of personal data to complete the booking information forms.

At the suppression hearing, the police officers testified positively that Walker had not requested an attorney, after receiving his *Miranda* warnings, following his arrest

and up through the booking. The arresting officer testified that Walker had replied "Yes, I do" to a question whether he understood his *Miranda* rights after they were read to him. Walker admitted that he did not request counsel when the Miranda warnings were read to him, stating that he simply remained silent. When asked if he had said anything about a lawyer between the scene of the arrest and when he was placed in jail, Walker replied: "I probably told them that I was going to need a good lawyer." Walker also testified: "I *think* I said at one time during the course of the questioning that I realized I was going to need a very competent attorney" (emphasis added).

We find no reversible error in the district court's denial of the motion to suppress this response. In the first place, the district court was entitled to find under the evidence that Walker, an educated man, understood the *Miranda* warnings that he had a right to remain silent, that anything he said could be used against him, that he was entitled to a lawyer and to have a lawyer present at any questioning (and to appointment of a lawyer, if unable to afford one); that Walker never requested an attorney; and that the exchange, initiated by Walker, was not designed to elicit incriminating information. *Cf.* Nash v. Estelle, 597 F.2d 513 (5th Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 485 (1979). In the second place, even assuming admission of the statement was error, it is difficult to ascribe, in the context of the entire evidence, any great prejudice occasioned by its admission.

C. *Jury Charge*

The district court charged the jury, over Walker's objection, that "[i]n determining the degree of credibility

that could be afforded to the defendant's testimony, you are entitled to take into consideration the fact that he is the defendant and the very keen personal interest that he has in the results of your verdict." Walker argues that the district court abused its discretion in giving this instruction, particularly because in this case the chief witness against him, Rummell, had a similarly keen interest in the proceedings because of his plea bargain.

This court has routinely upheld charges stating that a jury may take into account in its deliberations the defendants' keen interest in the outcome of the case. *See, e.g.*, United States v. Ylda, 643 F.2d 348, 352 (5th Cir. 1981); United States v. Jones, 587 F.2d 802, 806 (5th Cir. 1979). While the jury's verdict necessarily hung on its determination of Rummell's and Walker's credibility, which therefore lent special importance to the instruction, the jury also received an instruction warning it to receive Rummell's testimony with caution and to weigh it with great care. We find no error.

D. *Credit For State Pre-Trial Incarceration Toward Federal Sentence*

Walker was not given credit toward his life sentence (presumably sought for parole purposes) for his eight-month state pre-trial incarceration as he awaited trial in state court for murder. He argues that such credit is required by 18 U.S.C. § 3568.[9] This court in Ballard v.

9. Section 3568 provides, in pertinent part:
The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days

Blackwell, 449 F.2d 868 (5th Cir. 1971), interpreted this provision to mean that "time spent in State custody must be credited toward time served on a federal sentence if the continued State confinement was exclusively the product of such action by federal law-enforcement officials as to justify treating the State jail as the practical equivalent of a Federal one." 443 F.2d at 689. Walker argues that the active participation of the federal prosecutors in the state murder action justifies the conclusion that his state custody was the "functional equivalent" of his present federal custody for the civil rights conspiracy violation.

As the government asserts, Walker was confined in state prison because of a Texas statute that forbids bail in capital cases under certain circumstances. Cooperation between federal and state prosecutors did occur, but, as Walker concedes, the federal prosecutors did not issue a federal detainer against him during this period or, indeed, originally intend to charge him for a federal offense. His confinement was thus not "*exclusively* the product of . . . Federal law-enforcement officials," *Ballard, supra,* 449 F.2d at 869 (emphasis added), and Walker is not entitled to credit under § 3568 for his pre-trial incarceration.

E. *Government's Failure to Prove Elements of Offense*

Walker argues that he could not be deemed to have conspired to "intimidate" grand jury witness Overstreet in the "free exercise or enjoyment of any right or privi-

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spent in custody in connection with the offense or acts for which sentence was imposed.

* * *

No sentence shall prescribe any other method of computing the term.

lege," an essential element of the charged offense, 18 U.S.C. § 241 (*see* note 1 *supra*), because Overstreet, who was being compelled to testify, was not asserting the "*free* exercise" of a constitutional right.

We find little merit to this contention. "[T]he right to testify at trial is one secured by the constitution." United States v. Thevis, 665 F.2d 616, 626 (5th Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 57 (1983). As the government points out, few witnesses attend trials or appear before grand juries on a wholly voluntary basis; most are commanded by subpoena to appear. A witness served with a subpoena, or even one in Overstreet's position (who agreed to testify after being held in civil contempt) has as much constitutionally protected right to testify as he would have if he appeared without subpoena. *Accord*, United States v. Pacelli, 491 F.2d 1108, 1113 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43 (1974).

IV. *Conclusion*

Because we find that the trial court did not err in permitting the government to introduce the extrinsic offense evidence before the jury, and that Walker's other contentions likewise do not possess reversible merit, we AFFIRM the conviction.

AFFIRMED.

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Appellee,

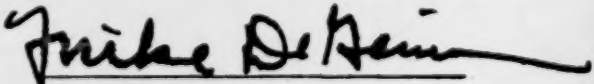
v.

LLOYD CHRIS WALKER,
Appellant.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

MIKE DEGEURIN, a member of the Bar of this Court, certifies that pursuant to Rule 28 he served three copies of the preceding Petition for Writ of Certiorari to the Supreme Court of the United States on counsel for the Appellee by enclosing these documents in an envelope, certified, first-class postage prepaid and addressed to: Honorable Archie Carl Pierce, Assistant United States Attorney, 200 W. 8th Street, Room 309, Austin, Texas 78701a, and depositing the envelope in the United States Post Office, Houston, Texas on September 2, 1983, and further certify that all parties required to be served have been served.



MIKE DEGEURIN

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No. 83-494

In the Supreme Court of the United States

OCTOBER TERM, 1983

LLOYD CHRIS WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the delay between petitioner's arrest on state charges and his indictment and trial in the district court deprived him of a Sixth Amendment right to a speedy trial or of due process under the Fifth Amendment.

2. Whether the district court erred in admitting extrinsic act evidence explaining why petitioner was approached to murder a federal grand jury witness.

3. Whether the district court erred in refusing to suppress defendant's false exculpatory statement made in a conversation initiated by him after he had been given *Miranda* warnings.

4. Whether the district court erred in charging the jury that they were entitled to consider petitioner's "keen personal interest" in the outcome of the trial in assessing the credibility of his testimony.

5. Whether petitioner was entitled to credit on his life sentence for pretrial state incarceration.

6. Whether petitioner could properly be convicted of conspiring to deprive a federal grand jury witness of the "free exercise or enjoyment" of the right to testify before a federal grand jury where the witness was testifying under compulsion.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-494

LLOYD CHRIS WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 710 F.2d 1062.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1983. The petition for a writ of certiorari was filed on September 9, 1983. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[1]

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to kill a federal grand jury witness in order to prevent the witness from testifying, in violation of 18 U.S.C.

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[1]Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1251 (see Pet. 2), but that provision is plainly inapplicable.

241.[2] The conspiracy resulted in the death of two innocent bystanders who were struck by a bullet fired at the witness. Petitioner was sentenced to imprisonment for life. The court of appeals affirmed his conviction (Pet. App. 1a-18a).

1. According to the evidence at trial, petitioner conspired with Boyce Wayne Rummell to murder Michael Overstreet in order to prevent Overstreet from implicating Rummell in a drug smuggling scheme in upcoming testimony before a federal grand jury. According to Rummell's testimony, he decided to hire someone to kill Overstreet, and telephoned petitioner. Petitioner previously had bragged to Rummell about serving as an enforcer for drug dealers, had assisted Rummell in a situation involving repossession of a pickup truck, and had offered to "help" Rummell in connection with a problem he was experiencing with a "gentleman that was going to testify against a group of people." Pet. App. 3a-4a.

In response to Rummell's telephone request for assistance, petitioner traveled by privately chartered airplane to Hidalgo County, Texas, early on the morning of July 13, 1980. Rummell met petitioner at the airport and agreed to pay petitioner $10,000 to kill Overstreet. After locating Overstreet at Pepe's Bar in Hidalgo County later that day, and watching him for several hours, petitioner fired one

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[2] 18 U.S.C. 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * * * *
>
> They shall be fined no more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

shot into the bar from a pickup truck driven by Rummell. A young man and a young woman were killed by the bullet meant for Overstreet. Pet. App. 1a-5a; Tr. 265, 324-336, 348-352, 358-360, 360-369, 371-376.[3]

2. State charges of conspiracy to murder and murder, arising from the shooting at Pepe's Bar, were initially lodged against Rummell. As part of a plea bargain in connection with those charges, Rummell identified petitioner as the man he had hired to kill Overstreet. In exchange for his guilty plea to charges under 18 U.S.C. 241, entered in federal court, the state capital murder charges against Rummel were dismissed.[4] As a result of Rummell's identification of petitioner, state prosecutors had him arrested on July 20, 1981. The state charged petitioner with conspiracy and murder.

Petitioner was arrested in New Mexico by state authorities on a Texas warrant. The arresting officers advised petitioner of his rights, as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner stated that he understood those rights. While his personal history was being taken at the police station, petitioner asked, "What in the hell is going on here?" The officer taking his history told him that he was charged with murder in Texas and asked if he knew one of the deceased victims and if he knew Boyce Rummell. Petitioner denied knowing either. The officer then said that was all he knew about the case. Pet. App. 14a; Tr. 118-119, 128, 133, 136, 138-139.

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[3]Petitioner testified at trial that he was present with Rummell at the time of the shooting and acknowledged that he fled from the scene with Rummell. He claimed, however, that Rummell fired the shot and that he had met with Rummell only to complete a drug transaction. Petitioner denied knowledge of and involvement in any conspiracy to kill or intimidate Overstreet. Pet. App. 2a, Tr. 675, 689-693, 698-699.

[4]Rummell received a federal sentence of 40 years' imprisonment.

Petitioner was held in state custody from the time of his arrest (July 1981) until March 1982, as state prosecutors sought to bring him to trial. When it appeared that the state charges against petitioner were in danger of being dismissed, federal prosecutors, who had originally referred the matter to their state counterparts, obtained an indictment charging petitioner with violation of 18 U.S.C. 241. Petitioner was taken into federal custody on March 31, 1982, and the state abandoned its efforts to try him.

In federal court, petitioner moved to suppress his post-arrest statement that he did not know Rummell. The officer who was present testified that petitioner had not requested an attorney prior to this conversation. Petitioner testified that at some point between his arrest and the time he was placed in jail he "probably told [the officers] that [he] was going to need a good lawyer." The district court denied the motion to suppress without opinion, and the government ultimately introduced petitioner's denial that he knew Rummell as a false exculpatory statement. Pet. App. 14a-15a.

Rummell testified at trial that he decided to approach petitioner to kill Overstreet because he needed someone knowledgeable about such things and thought that petitioner would assist him. On cross-examination petitioner elicited Rummell's acknowledgment that he did not tell defendant during their telephone conversation that he wanted petitioner to kill Overstreet. Rummell was then asked on redirect why he had called petitioner for assistance in the murder. Rummell answered initially that he had contacted petitioner based on his "reputation." Petitioner's objection to this testimony was sustained. Over objection, Rummell was then permitted to testify regarding petitioner's specific acts and statements that had led him to believe that petitioner would be ready and willing to kill for money. Rummell testified that, on a prior occasion, petitioner had

accompanied him and an associate when they went to reclaim a pickup truck that had been borrowed from the associate. Petitioner, who was armed, went along to act as "insurance" or "protection." On that occasion, Rummell told petitioner that he was having a problem with a "gentleman that was going to testify against a group of people." Petitioner said "that if [Rummell] needed any help, to let him know." In this connection, Rummell also testified that petitioner had claimed to have killed quite a few people in Viet Nam. Petitioner had also told Rummell that he had performed "services for drug dealers * * * of a violent nature" including "shooting a gentleman in both knees or something * * * to induce him to pay some money that was owed on a drug deal." Pet. App. 3a-5a.

3. The court of appeals affirmed petitioner's conviction (Pet. App. 1a-18a). The court ruled that, given petitioner's cross-examination of Rummell disclosing the absence during their initial phone conversation of any express agreement by petitioner to kill Overstreet, the district court properly allowed Rummell to testify on redirect examination concerning his prior contacts with petitioner for the purpose of demonstrating that petitioner must have understood the nature of the assistance Rummell sought (Pet. App. 7a-10a). The court concluded that the probative value of that testimony outweighed any prejudicial potential it may have carried (Pet. App. 10a-11a).

The court of appeals likewise found no error in admission of petitioner's false exculpatory statement made to the booking officer in New Mexico. The court determined that petitioner did not invoke his right to counsel after the *Miranda* warnings were given and observed that the exchange with the officer, initiated by petitioner, was "not

designed to elicit incriminating information" (Pet. App. 15a).[5]

The court held that no violation of petitioner's Sixth Amendment right to a speedy trial or of his Fifth Amendment right to due process resulted from either the eight-month period while petitioner was in state custody or the 72-day period between federal indictment and trial (Pet. App. 11a-14a). Nor did the court find any basis for petitioner's claim that he was entitled to credit on his federal sentence for time served in state pretrial detention (Pet. App. 16a-17a). The court concluded that while state and federal prosecutors had worked together closely in investigating the murders, the United States did not originally intend to obtain a federal indictment against petitioner. Thus, the time spent in state custody was not the functional equivalent of federal custody for the conspiracy violation (*ibid.*).

The court found "little merit" to petitioner's contention that he could not be guilty of conspiring to intimidate Overstreet in the "free exercise" of his right to testify simply because Overstreet was testifying under legal compulsion (Pet. App. 17a-18a). Finally, the court found no error in a jury charge that noted petitioner's "keen personal interest" in the case, observing that the jury was also cautioned to weigh the testimony of co-conspirator Rummell with great care (Pet. App. 15a-16a).

ARGUMENT

The court of appeals' careful opinion addresses each of the six issues raised by the petition. Petitioner has not demonstrated any error in the court of appeals' resolution of these issues and has demonstrated no other basis for further review.

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[5]The court also observed that any error in admission of this statement was harmless (Pet. App. 15a).

1. Petitioner claims (Pet. 7-15) that his Sixth Amendment right to a speedy trial attached at the time of his state arrest and that the court of appeals erroneously excluded from consideration the eight-month period during which he was in state custody prior to the return of the federal indictment in rejecting his Sixth Amendment claim. But the protection of the Sixth Amendment extends only to persons formally "accused" by arrest or indictment (*United States* v. *MacDonald*, 456 U.S. 1, 6-7 (1982)), and petitioner plainly had neither been arrested nor indicted prior to March 29, 1982, on the federal charge upon which he ultimately was tried. Petitioner was promptly tried thereafter. His trial was originally set for June 1, 1982, and was postponed at petitioner's request until June 9, 1982 (R. 189-192).[6]

Petitioner argues that he should be deemed to have been "accused" by the United States upon the initiation of state proceedings because federal prosecutors referred the case to state prosecutors and because of alleged "court shopping" by federal prosecutors (Pet. 7, 10-12). However, the court of appeals determined that the evidence supported the United States' representation that it initially had no intention to charge petitioner with any federal offense and only did so after the state prosecution appeared to be floundering (Pet. App. 12a). This is essentially a factual determination that does not warrant further review by this Court. In any event, petitioner concedes (Pet. 11) that the United States did not originally intend to prosecute him.

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[6]Petitioner does not appear to contend, and did not contend below (see Pet. App. 12a), that the 72 days elapsed between his federal indictment and trial violated his Sixth Amendment rights.

Petitioner cites no authority for the contention that his rights were violated because federal prosecutors encouraged the state prosecution. Petitioner's admission that federal officials were primarily interested in his state prosecution demonstrates that those proceedings were not a pretext to restrain petitioner until such time as federal authorities decided to prosecute. State arrest does not constitute a federal "accusation" for purposes of the Sixth Amendment in such circumstances. See *United States* v. *Cordova*, 537 F.2d 1073, 1075-1076 (9th Cir.), cert. denied, 429 U.S. 960 (1976); *United States* v. *DeTienne*, 468 F.2d 151, 155 (7th Cir. 1972), cert. denied, 410 U.S. 911 (1973); *United States* v. *Brown*, 605 F.2d 389, 395 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *United States* v. *Romero*, 585 F.2d 391, 398 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); see also *United States* v. *MacDonald*, 456 U.S. at 10 n.11.

Mindful of this Court's admonition that the "Due Process Clause has a limited role to play in protecting against oppressive delay" (*United States* v. *Lovasco*, 431 U.S. 783, 789 (1977)), the court of appeals properly held that the time elapsed prior to petitioner's federal indictment entailed no violation of the Fifth Amendment. As the court below recognized, the United States demonstrated an adequate and proper reason for the delay between the offense and petitioner's trial — the government's decision to defer to state prosecution. Petitioner wholly failed to show any "actual prejudice to the conduct of the defense" or intentional delay by the government to gain some tactical advantage (Pet. App. 13a). Compare *United States* v. *Marion*, *supra*, 404 U.S. 307, 325 (1971).

2. Petitioner contends (Pet. 15-21) that admission in evidence of Rummell's testimony concerning petitioner's claims to have committed violent acts in the past and concerning petitioner's prior service to Rummell as an "enforcer" was

improper under Fed. R. Evid. 404(b). That provision prohibits introduction of evidence of "other wrongs" to prove a defendant's bad character or propensity to commit acts such as those constituting the offense charged. However, such evidence may be admitted under the Rule if relevant to prove a fact other than character, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Admissibility of "bad acts" evidence is also subject to the generic requirement of Fed. R. Evid. 403, that probative value not be substantially outweighed by the danger of unfair prejudice. The court of appeals' application of these rules to the facts of this case is entirely fact-bou d and thus does not warrant further review; it is in any event correct.

The testimony at issue was adduced upon the government's redirect examination of Rummell after petitioner's cross-examination of Rummell raised doubt as to whether petitioner knowingly agreed to join the conspiracy to kill a federal grand jury witness (Pet. 10a). The disputed evidence thus became relevant to the issues of knowledge and agreement (*ibid.*). In the circumstances, the court of appeals properly concluded that the probative value of the incident in which petitioner had provided armed "protection" to Rummell in repossessing a pickup truck outweighed whatever prejudice might have flowed from introduction of this evidence. Indeed, petitioner protests (Pet. 18) that, in the particular circumstances described, his participation in this incident would not necessarily be perceived as reflecting a propensity for use of excessive force.

Rummell was also allowed to testify on redirect that he sought out petitioner to carry out the murder based upon petitioner's prior statement of willingness to be of assistance in the matter of a witness who was giving Rummell a "problem," and petitioner's statements indicating that he had killed in the Viet Nam war, was not opposed to killing

again, and had performed services of a violent nature for drug dealers, including a "kneecapping". The relevance of this testimony does not depend on the jury's believing that petitioner actually committed such acts but only that, having thus bragged to Rummell, he would have understood that Rummell's telephone request for assistance required some violent act (Pet. App. 11a).[7] While the court of appeals was somewhat more troubled by the prejudicial potential of this portion of the challenged testimony, the court properly upheld its admission, on the ground that the testimony was introduced only to show that statements were made and because, although entitled to a jury instruction restricting consideration of this testimony to proper purposes, petitioner did not request one (Pet. 11a). As the court of appeals observed (Pet. App. 10a), in assessing petitioner's alibi (see page 3 note 3, *supra*), it was important to determine whether petitioner understood the nature of Rummell's request prior to arriving in Hidalgo County (Pet. App. 10a). The disputed testimony was accordingly highly relevant. Petitioner therefore cannot establish that unfair prejudice outweighs the probative value of the disputed testimony.[8]

3. Petitioner next contends (Pet. 21-23) that the district court improperly admitted his statement, made during booking procedures, denying that he knew Boyce Rummell. Petitioner correctly states (Pet. 21) the rule established by this Court in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *i.e.*, that an accused who has been given his *Miranda* warnings

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[7]The cases cited by petitioner (Pet. 18-19) are inapposite because petitioner's statements that he had killed or maimed were not introduced to show that he had actually done so and thus had a propensity to do so again.

[8]We note that the prosecutor emphasized in closing argument that the testimony was important only as evidence of petitioner's joinder in the conspiracy (Tr. 836).

and has expressed a desire to have counsel present may not be questioned further until counsel is provided, unless the accused initiates any further conversation. Petitioner fails, however, to establish the factual predicate for application of that rule.

The court of appeals properly concluded that the evidence at the suppression hearing demonstrated that petitioner did not request appointment of counsel between the time he acknowledged understanding the *Miranda* warnings and the conversation with the booking officer during which he denied knowing Rummell (Pet. App. 15a). See pages 3-4, *supra*. Because petitioner had not invoked his right to counsel, any interrogation that followed did not violate petitioner's constitutional rights. In any event, even "indulg[ing] in every reasonable presumption against waiver" (*Brewer* v. *Williams*, 430 U.S. 387, 404 (1977)), and viewing petitioner's testimony concerning invocation of his right to counsel in the light most favorable to his claim, it is clear that the subsequent conversation was initiated by petitioner's question, "[w]hat in the hell is going on here?" And as the court of appeals concluded, the evidence demonstrated that the exchange that followed was not intended as interrogation (Pet. App. 15a). Rather, the police officer's very limited remarks to petitioner were responsive to petitioner's question. No *Miranda* violation may be found in these circumstances. See *Oregon* v. *Bradshaw*, No. 81-1857 (June 23, 1983). In any event, the court of appeals properly held (Pet. App. 15a) that, even if admission of the statement were error, its admission was, in the context of the evidence against petitioner, harmless.

4. Petitioner's remaining contentions require little discussion. First, there is no merit to the argument (Pet. 29) that, because Overstreet was slated to testify pursuant to subpoena, petitioner's actions do not support conviction under 18 U.S.C. 241 for conspiracy to intimidate Overstreet

in the "free exercise" of his constitutional rights. As the court of appeals recognized (Pet. App. 18a), petitioner's interpretation of the statute would remove its protections from the majority of witnesses whom the statute was designed to protect; few witnesses appear before grand juries on a wholly voluntary basis. And even where testimony is given under compulsion of law, oppression of persons because of the *content* of their remarks in the discharge of the civic duty to provide evidence is assuredly inconsistent with free exercise of constitutional rights. In any event, the very legislative history cited by petitioner (Pet. 29) clearly reflects that the statute was intended to protect persons fulfilling legal duties as well as those exercising privileges.

Second, the court of appeals correctly held that there was no error in the district court's instruction to the jury that petitioner's "keen interest" in the verdict could be taken into account in assessing his credibility (Pet. App. 15a-16a). In arguing (Pet. 24) that Rummell, the principal witness against him, had as great, if not a greater, stake in the proceedings, petitioner disregards the district court's instruction directing that the testimony of an accomplice be received with caution and weighed with great care. The court of appeals emphasized this balancing instruction in upholding the jury charge viewed as a whole (Pet. App. 16a). The court of appeals' ruling does not conflict with any decision of this Court or any other court of appeals.[9]

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[9]Instructions similar to those given in this case routinely have been approved in other circuits, even in the cases cited by petitioner (Pet. 23-24). See, *e.g.*, *United States* v. *Martin*, 525 F.2d 703, 706-707 (2d Cir.), cert. denied, 423 U.S. 1035 (1975); *United States* v. *Hill*, 470 F.2d 361, 363-364 (D.C. Cir. 1972). While the Seventh and Eighth Circuits have expressed a preference for general instructions on witness credibility that include passing reference to the defendant, *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); *United States* v. *Long*, 449 F.2d 288, 298-299 (8th Cir.

Finally, the court of appeals correctly held that petitioner was not entitled, under 18 U.S.C. 3568,[10] to credit on his federal sentence for time spent in state custody prior to federal indictment (Pet. App. 16a-17a). Such credit is allowed only where "continued State confinement was exclusively the product of such action by federal law-enforcement officials as to justify treating the State jail as the practical equivalent of a Federal one" (*Ballard* v. *Blackwell*, 449 F.2d 868, 869 (5th Cir. 1971)).[11] Here, as petitioner concedes (Pet. 11), there was neither a federal indictment nor any intention to seek one during the bulk of the period of state custody. Neither court below found support for petitioner's factual contention (Pet. 25-28) that federal and state cooperation, either in his own case or that of Boyce Wayne Rummell, was such as might render state custody the "functional equivalent" of federal custody for purposes of 18 U.S.C. 3568. Accordingly, there is no occasion to review the ruling below holding that statute inapplicable.

1971), cert. denied, 405 U.S. 974 (1972); *Taylor* v. *United States*, 390 F.2d 278 (8th Cir.), cert. denied, 393 U.S. 869 (1968), in none of these cases did the court find reversible error in the use of an instruction such as was given here where the charge as a whole was not unfairly prejudicial.

[10]18 U.S.C. 3568 provides, in relevant part,

> The Attorney General shall give any * * * person [convicted of an offense] credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

[11]Petitioner cites no contrary authority, and we know of none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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